IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 679 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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JENABEN @ JENAMBEN RAJAKBHAI ISMAIL - Appellant(s)
Versus
THE STATE OF GUJARAT - Opponent(s)

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Appearance :
MS ROOPAL R PATEL for Appellant(s) : 1,
MS DS PANDIT, ADDL. PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 25/10/2007

CAV JUDGMENT

1. The appellant-Jenaben @ Jenamben Razakbhai Ismail has preferred the present appeal assailing the legality and validity of the

conviction and sentence passed by the learned Additional Sessions Judge [6th Fast Track Court], Rajkot, in N.D.P.S. Special Sessions Case No. 6 of 2003 on 29.9.2003. The appellant lady has been held guilty of the charge of offence punishable under Section 22 of the N.D.P.S. Act. However, as she has been found guilty for the second time for the offence punishable under the provisions of the N.D.P.S. Act [hereinafter to be referred to as "the said Act"], she has been held responsible to undergo enhanced punishment for the offences punishable under Section 31 of the said Act after previous conviction. The appellant-convict is sentenced to suffer rigorous imprisonment for 2 years and fine of Rs. 10,000/- and in default of payment of fine, she has been ordered to undergo rigorous imprisonment for 5 months for the offence punishable under Section 22 of the said Act. However, she is ordered undergo rigorous imprisonment for 5 years and to pay fine of Rs. 50,000/- and in default of payment of fine, she is ordered to undergo punishment for 1 year

under the provisions of Section 31 of the said Act.

2. This Court has received the memo of appeal through the jail authorities. Ms. Roopal Patel, learned counsel appointed by the Registry of this Court to present case of the appellant-convict has addressed the Court. It is submitted by Ms. Roopal Patel that the order of conviction and sentence holding the appellant-convict guilty of the charge for the offence punishable under Section 22 of the Act is bad and is not sustainable considering the facts placed by the prosecution and the relevant legal provisions, mainly the Scheme of Section 42 of the N.D.P.S. Act. She submitted that the irregularity committed by the raiding officer before raiding the premises goes to the root of the legality and validity of the seizure of muddamal brown sugar and as the provisions of Section 42 of the said Act are mandatory, non-compliance of the provisions of the said Section would make conviction bad and the resultant effect would be that the irregularity committed by the raiding party, mainly, the officer heading the team in such or similar circumstances, would result into serious prejudice to the defence of the accused. She has taken me through the oral as

well as documentary evidence led by the prosecution. However, in response to the query raised by this Court, she has fairly conceded that as such there is no dispute about the previous conviction of the present appellant-convict recorded by the competent court under the provisions of the said Act. It is submitted that in the present case, conviction of the appellant-convict is second conviction for committing an offence punishable under the provisions of the said Act.

3. I have heard Ms. D.S. Pandit, learned APP for the State. According to her, order of conviction and sentence is absolutely legal and there is no infirmity either in the investigation or in the evidence led by the prosecution. Ms. Pandit submitted that on information being received, raid was carried out at the premises of the appellant-convict lady with the help of a lady police constable and the accused lady was found in possession of brown sugar weighing 18 grams worth Rs. 1,80,000/-. The said raid was carried out on 23rd February, 2003 at about 20.35 hours at the residential house of the convict at Rajkot That as she was found present at the time of the raid, no formal evidence as to the ownership of the house was

required to be proved. It is submitted by her that the investigation was genuine otherwise raiding team could have implicated more than one member of the family in such a serious case.

4. To appreciate the rival contentions and the point argued by both the sides qua the quantum of punishment imposed by the trial court under Section 31 of the said Act, firstly, it would be beneficial to state the basic facts that were placed before the trial court.

5. It is alleged that the convict Jenaben @ Jenamben Razak Ismail was convicted by the Court of Session for the offence punishable under Sections 22 and 29 of the said Act and thereafter, again on 23rd February, 2003, at about 20.35 hours, on secret information being received, the police had raided her residential house at Rajkot and the appellant-convict was found in possession of brown sugar worth Rs. 1,80,000/- weighing 8 grams. On being asked about the permit for the same, she was not able to produce any permit for keeping the brown sugar in her possession. Therefore, the muddamal brown sugar was seized, sealed and then was sent for analysis to the Forensic Science Laboratory. The Forensic Science Laboratory opined that the

substance found from the possession of the appellant-convict was brown sugar and thereafter, the appellant-convict came to be charge sheeted for the offence punishable under Section 22 read with Section 31 of the said Act. On completion of the raid, complainant Mr. R.R.Gohil, Police Sub Inspector, D.C.B. Police Station, Rajkot, filed FIR against the accused before the “B” Division Police Station of City of Rajkot and on receipt of the complaint, “B” Division Police Station registered a crime against the appellant-accused vide CR No. 1/2003.

6. On appreciation of oral as well as documentary evidence, it is clear that the premises was raided on 23rd February, 2003 after sunset and before sunrise. From the certified copy of the judgment rendered in Sessions Case No. 1/2001 produced on the record vide exh. 43, it appears that the appellant-convict, along with one co-accused, namely, Sharif Majidbhai Pama was held guilty of the charge of the offence punishable under Section 22A read with Section 29 of the said Act. It further appears from the said judgment that in the said case, the present appellant-convict was held responsible for possessing 26 small packets of brown sugar and

amount of Rs. 3,200/- in currency notes of different denominations. However, the total weight of the brown sugar was found to be of 2 grams and 800 miligrams. Ms. Roopal Patel has no specific instructions, but she has stated that perhaps no appeal against the order of conviction and sentence in the said Sessions Case was filed. At least, there is nothing on record to show that she has been acquitted even today in that case. The conviction that was recorded in the earlier case was on 8th February, 2002. Therefore, after about one year from the date of conviction on 23rd February, 2003, she was again found in possession of 18 grams of brown sugar. The evidence as to the receipt of secret information has been proved by more than two witnesses, namely, P.W. No.1 Shri R.G. Patil, Unarmed Police Head Constable, D.C.B., Rajkot, exh. 5 and P.W. No.4 Shri Rajedra R. Gohil, exh. 11. Plain reading of the evidence of these two witnesses gives an impression that they corroborate each other. Name of the informant is also mentioned in the deposition of the Police Head Constable, P.W. 1. According to these witnesses, the information was given by the Police Head Constable Manubha Zala to P.S.I. R.R. Gohil. Thereafter, P.S.I. Gohil

arranged for a lady police constable and panchas were also called. The information was received at about 19.00 hours. That information was recorded in writing and the Police Control Room was also informed at about 19.20 hours. Deputy Commissioner of Police was also informed by the raiding officer that they are proceeding to raid the residential premises of the appellant accused and necessary entries were also made in the station diary. Preliminary panchnama was also prepared and the raiding party along with the panchas had proceeded to raid the residential house of the appellant accused at 20.17 hours. The said entry was also made into the station diary and control room was also informed at 20.17 hrs. It is the say of the prosecution witnesses that during the raid, she was asked to give personal physical search and was asked if she wanted to get herself searched in presence of any other independent gazetted officer. The accused lady had assented and had not insisted for presence of any other independent gazetted officer. She was searched and brown sugar was found wrapped in the “Khes” of Punjabi dress worn by her. After reading the evidence, Ms. Roopal Patel has fairly accepted that as such, there are no material

contradictions in the evidence led by the prosecution, mainly three police officers. Even the panchas have also admitted the act of raid and seizure of brown sugar from the personal custody of the accused, that is, P.W. 3 Mahesh Mansukhlal Kotak, exh. 9. There is no irregularity or illegality found in the sealing process. Backbone of the argument of Ms. Patel is that no formal reasons were recoded by the raiding officer expressing subjective satisfaction as to why the raid was required to be carried out during the night hours, that is, after the sunset and before the sunrise and therefore, this makes the raid invalid and as such, the raid would make personal search and seizure of brown sugar found from the accused illegal. However, I do not find any merits in the submission. It is rightly pointed out by Ms. Pandit, learned APP that the documents at exh. 14 and 15 satisfy the legal requirement as contemplated under Section 42 of the said Act. Exh. 14 is a copy of the message sent to the In-charge of Police Control Room, Rajkot by the raiding officer Mr.R.R. Gohil. Time shows that the same was sent at 19.10 hrs. and the act of sending this message to the In-charge of Police Control Room, Rajkot was mentioned in the station diary and

Mr.Gohil had informed the Police Control Room that in reference to the information received about the illegal existence of packets of brown sugar, urgent steps were required to be taken otherwise, the said packets of brown sugar were likely to be disposed of. Similar fact is reflected again in the station diary being entry no. 13/03, wherein it is stated that the raiding officer Mr.R.R. Gohil had informed the Control Room that they were proceeding to carry out the raid, because, they apprehended that if the raid was not carried out at the earliest and things were not investigated immediately, then the brown sugar packets may be disposed of. Preliminary panchnama was drawn as stated hereinabove. Undisputely, the raid was carried out by the officer authorized to enter the premises of the accused and also to search and seize the muddamal if found and also to arrest the accused without warrant. Obligation on the part of the raiding officer is that he is supposed to record the reasons stating urgency to carry out such entry, search or seizure if the same is required to be made after sunset and before sunrise. Information was received at 19.00 hrs, meaning thereby that after the closure of the Court etc. The said information was in reference to

the person who was held guilty earlier by the competent court and that too, for possessing prohibited substance like brown sugar. Scheme of Section 42 is that if the raiding officer has reason to believe that the raid is required to be carried out at the earliest and any delay would provide an opportunity to the accused for concealment of the evidence or facility to escape or dispose of the muddamal, then, by recording such satisfaction, he may decide to enter and search the building, conveyance or a enclosed place any time between sunset and sunrise and he is supposed to record the grounds of his belief. In the present case, in the documents exhs. 14 and 15, grounds are found recorded satisfactorily. Therefore, it is not possible for this Court to say that the raid carried out by Mr. Gohil along with the raiding team was either bad or illegal. It is also found that Section 15 was also satisfactorily applied and therefore, it is not possible for this Court to observe that the conviction recorded by the trial court is either bad or illegal.

7. It is not necessary to re-write the details of the evidence recorded during the course of the trial. Learned trial Judge has discussed the evidence led

by the prosecution witnesses including the evidence of panch witnesses, police station diary entries, information sent to the superior officers etc. in detail and when this Court is not able to find out any material error in appreciation of the evidence, the Court can simply say that the finding recorded by the learned trial Judge is based on correct and proper appreciation of evidence. According to Ms. Roopal Patel, quantum of punishment imposed by the learned trial Judge on the appellant-convict appears to be harsh and therefore, the same requires to be reduced. Apparently, the quantum of punishment imposed by the trial court is found adequate, but the punishment imposed under Section 31 of the said Act is harsh and therefore, the same should be reduced. On the other hand, say of the learned APP Ms. Pandit is that prohibited substance found from the custody of the appellant-convict is not a substance which is traditionally used like opium or Ganja. Brown sugar, heroin etc. are very sensitive substances and considering the number of packets found in possession of the appellant-convict, it indirectly proves that she must be distributing these small packets to regular customers, that is, addict persons and therefore,

no leniency should be shown by the Court. It is therefore submitted that the order of conviction and sentence imposed by the learned trial Judge should be upheld. On reading Sections 22 and 31 of the said Act simultaneously and other provisions of the said Act, it appears that the said Sections provide punishment for possessing narcotic drug and/or psychotropic substance. But, Section 31 of the said Act would apply to each of the convicts who is found guilty of the offence punishable under the provisions of the said Act for the second time, meaning thereby that the second offence should be viewed seriously which is the intention of the legislator. As such, Section 31 of the said Act is not an offence or does not provide punishment for any particular offence. Section 31 empowers the Court to impose enhanced punishment for the offences after previous conviction under the provisions of the said Act. Therefore, if the prosecution is able to satisfy the Court that a person who has been convicted for commission of an offence or for attempt to commit or to abet etc. that is, any of the offences punishable under the provisions of the said Act and if the conviction is subsequent conviction of the commission of the

offence punishable under the provisions of the said Act, then, he should be subjected to some enhanced punishment. There is no discretion with the Court and the Court is bound to impose punishment within the limits prescribed under Section 31 of the said Act. It is not legally possible for the Court to say that the Court is not inclined to award any enhanced punishment though the offender is found guilty in the subsequent offence also. The Court also cannot impose simple punishment. Imposition of rigorous imprisonment is mandatory under Section 31 of the said Act, but the Presiding Judge is left and is conferred with the jurisdiction to determine the period of such enhanced punishment. It would be beneficial to reproduce relevant part of Section 31 of the N.D.P.S. Act as under:-

"31:Enhanced punishment for offences after previous conviction.-*[1] If any person who has been convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, any of the offences punishable under this Act is subsequently convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, an offence punishable under this Act with the same amount of punishment shall be punished for the second and every subsequent offence with rigorous imprisonment for a term which*

may extend to one-half of the maximum term of imprisonment and also which may extend to one-half of the maximum term of imprisonment and also which may extend to one-half of the maximum term of imprisonment and also be liable to fine which shall extend to one-half of the maximum amount of fine.

[2] Where the person referred to in sub-section [1] is liable to be punished with a minimum term of imprisonment and to a minimum amount of fine, the minimum punishment for such person shall be one-half of the minimum term of imprisonment and one-half of the minimum amount of fine:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding the fine for which a person is liable.

[3] xxx xxx xxx"

8. The above Scheme provides for enhanced punishment under this Act on second/subsequent conviction, i.e., the second conviction or on third conviction, the Court is supposed to impose enhanced punishment and that punishment must be rigorous imprisonment. But the period of such punishment would be up to one half of the maximum term of imprisonment imposable in the subsequent offence found proved. Imposition of fine is also mandatory, because, it is provided that such accused also is liable to pay fine. But

here, discretion has been inserted and the Court is empowered to impose any amount of fine to the extent of one half of the maximum amount of fine that can be imposed for such offence proved. The Act provides that when a person is liable to be punished with enhanced punishment under sub-section [2] where minimum punishment is prescribed and is also responsible to pay minimum amount of fine prescribed, then, the minimum punishment for such person-convict should be one half of the minimum term of imprisonment and one half of the minimum amount of fine. Proviso under sub-section [2] empowers the Court to impose fine exceeding the amount of fine that can be imposed where minimum amount of fine is prescribed by recording reasons in the judgment and therefore, when minimum fine prescribed under the law is additional 50%, then, while recording subsequent conviction as per sub-section [2], the Court can impose additional amount of fine, say, of Rs. 25,000/-. But if the Court is desirous to impose fine of more than Rs. 25,000/-, then, in that eventuality, the Court shall have to record reasons as to why accused is fastened with the liability to pay excess amount of fine than the amount of fine contemplated under sub-section [2].

In the present case, the question that has cropped up before this Court when deliberations were being made, was that whether the order of the punishment imposed under Section 31 is legal or some error can be said to have been committed in computing one half of the period of punishment prescribed for subsequent offence found proved. For the sake of argument, even if it is accepted that adequate enhanced punishment is within the Scheme of the Act and punishment is provided for the offence punishable under Section 22 of the said Act read with Section 31 of the said Act, but when the Presiding Judge has decided not to impose maximum punishment provided under Section 22 of the said Act and has imposed some lesser punishment than the maximum punishment prescribed, then, whether enhanced period of punishment under Section 31 of the said Act can be permitted to exceed the quantum of punishment imposed for the main offence found proved on subsequent conviction is a question to be considered. Section 31 of the said Act authorizes the Court to impose enhanced punishment for each subsequent conviction under the Act. Section 31 mainly provides outer limit of such enhanced period of punishment keeping the area of imposition of

amount of fine open if the Court is able to record some good and sound reasons for imposing additional amount of fine. The Court in a given case of international trafficking of narcotic drug or psychotropic substance on subsequent conviction can impose fine of Rs. 50.00 crores.

9. Section 31 is nothing but an introduction of theory of deterrence. The Courts are bound to follow the theory of deterrence while imposing punishment so that the Courts may not become too much lenient while awarding punishment when the offence punishable under the provisions of the said Act being sensitive aspect concerning the entire society. We have worldly commitment to curb illicit trafficking, storing, selling, manufacturing, etc. so far as the narcotic drugs and psychotropic substances are concerned. Therefore, the approach of the Court should not be contrary to the intention of the legislature.

10. It is needless to say that what sentence could have been imposed and what sentence has been actually imposed, are two different aspects in the field of penology. Here, in the present case, the Presiding Judge has decided not to impose maximum punishment prescribed under Section 22 of the said Act. It

would also be relevant to note that there is no appeal filed by the State under Section 377 of the Code of Criminal Procedure, praying for enhancement of punishment imposed by the trial court. Under Section 31 of the said Act, one half of the punishment exceeding the period of punishment was required to be imposed and if the Court finds that on one hand the Presiding Judge has decided not to impose maximum punishment prescribed under the Act and on the other hand, imposes one half period of maximum punishment prescribed under Section 31, then, it is an error of law in the opinion of this Court. Without entering into the controversy and the fact that whether the learned trial Judge has committed jurisdictional error of law, it requires to be observed that the learned trial Judge could not have imposed more severe punishment in exercise of powers vested in him under Section 31 of the said Act than the quantum of punishment imposed under the main Section, that is, under Section 22 of the said Act.

11. In view of the aforesaid, the appeal obviously shall have to be allowed partly as the substantive sentence as well as sentence of fine shall have to be reduced to bring the quantum within the scope of

Section 31 of the N.D.P.S. Act. Mind and heart of law breakers are always considered by our Courts keeping in mind all social and factual perspectives and when the intention of law framers is apparent, on plain reading of Section 31 of the said Act, imposition of substantive sentence under Section 31 in the present case is found erroneous and therefore, the punishment imposed under Section 31 of the N.D.P.S. Act on the appellant-convict to suffer rigorous imprisonment for 5 years requires to be reduced to 2 years as the same could not exceed substantive punishment imposed under Section 22 of the N.D.P.S. Act. Amount of fine of Rs. 50,000/- imposed on the appellant-convict under Section 31 of the N.D.P.S. Act is also not found sustainable and therefore, the same is required to be reduced to Rs. 10,000/-, that is, equal to the amount of fine imposed under Section 22 of the N.D.P.S. Act. Rigorous imprisonment imposed in default of payment of fine now shall be of 5 months instead of 1 year imposed by the trial Judge.

12. The Court is of the view that under Section 31 of the N.D.P.S. Act, it is possible for this Court to reduce punishment to 1 year and amount of fine to Rs. 5,000/-, that is, one half of the punishment

imposed under Section 22 of the N.D.P.S. Act, but keeping in mind the substance that was found in conscious possession of the appellant-convict, the Court has decided to impose substantive sentence and fine which amount of fine exceeds the period of punishment imposed under Section 22 of the N.D.P.S. Act. Rest of the order passed by the learned trial Judge in reference to Section 428 of the Code of Criminal Procedure is required to be kept unaltered.

13. For the reasons aforesaid, the appeal is partly allowed. The order of conviction recorded by the learned trial Judge is hereby upheld. In the same way, the order of sentence passed under Section 22 of the N.D.P.S. Act is also hereby upheld. However, the order of sentence passed under Section 31 of the N.D.P.S. Act, on account of it being subsequent offence is hereby quashed and the same is reduced, meaning thereby, the appellant now shall undergo rigorous imprisonment for 2 years instead of rigorous imprisonment of total period of 5 years imposed by the trial court, and shall pay fine of Rs. 10,000/- [Rupees Ten Thousand only] instead of Rs. 50,000/- imposed by the trial court, for the offence punishable under Section 31 of the N.D.P.S. Act. The punishment imposed in default of payment of

fine is also hereby reduced from rigorous imprisonment of 1 year to rigorous imprisonment of 5 months. If the appellant has paid the amount of fine, then, the excess amount of fine shall be refunded back to the appellant on proper identification. If the appellant has served substantive sentence, then, she shall be set at liberty forthwith if she is not required by the jail authorities for any other purpose.

[C.K. Buch, J.]

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